U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B-6

[redacted]

JUL 8 2004

FILE: WAC 02 207 52761 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an international freight forwarding concern. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 22, 1999. The proffered wage as stated on the Form ETA 750 is $18.10 per hour, which equals $37,648 per year.

With the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes based on the calendar year.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $220,789 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $113,096 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 9, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence include copies of annual reports, federal tax returns, or audited financial statements. The Service Center noted that the evidence must demonstrate the ability to pay the proffered wage beginning in 1999.

In response, counsel submitted additional copies of the petitioner's 2000 and 2001 tax returns. Counsel also submitted a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return. The 1999 return shows that the petitioner declared a loss of $136,196 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

In addition, counsel submitted a compiled financial report for the period ended July 31, 2002 and copies of the petitioner's California Form 100-ES Corporation Estimated Tax statements for 2001. The proposition which counsel intended to support with the estimated tax statements is unclear.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 7, 2003, denied the petition.

On appeal, counsel stated that the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), precludes denial based solely upon the inability of the petitioner to pay the proffered wage out of its net profits during a given year. Counsel noted that the petitioner's gross income and total assets had increased between 1999 and 2002. Counsel stated that the petitioner had employed the beneficiary at an annual wage over $23,000 during 2001 and 2002. Counsel stated that the petitioner's 2002 net income would be $222,520.

With the appeal, counsel provided the petitioner's compiled 2002 financial statement and additional copies of the petitioner's 1999, 2000, and 2001 income tax returns. Counsel also provided Form 941 Employer's Quarterly Federal Tax Returns showing the amount the petitioner paid in wages during all four quarters of 2002 and California Form DE-6 Quarterly Wage and Withholding Reports showing the employees to whom those wages were paid during those same quarters. Counsel provided 2002 W-2 forms confirming those amounts.

Counsel's submissions also include the beneficiary's 1997, 1998, 1999, 2000, 2001, and 2002 income tax returns with W-2 forms attached. The W-2 forms showing that the petitioner paid $9,350, $16,256.66, $21,400, $21,250, $23,100, and $23,560 in wages to the beneficiary during those years, respectively.

Finally, counsel submitted a copy of the petitioner's catalog, a copy of its business license, and a copy of the unaudited financial statements of a Korean company. The proposition those three submissions were intended to support is unclear.

In asserting that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), prohibits denial of a petition solely because of its net profits, counsel overstates the breadth of that decision.

Matter of Sonegawa, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. *Sonegawa* does not stand for the proposition that a petitioner's losses or low net income are an insufficient reason to deny a petition. It stands for the proposition that the inference that would ordinarily follow from such losses or low net profits may, with sufficient evidence, be overcome.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are the requisite evidence of a petitioner's ability to pay a proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the petitioner's total assets is similarly misplaced. A petitioner's total assets are not available to pay a proffered wage, as some items included in total assets, its interest in real estate, for instance, are not expected, pursuant to the ordinary course of business, to be converted to cash. Other assets might be expected to be converted to cash, but by no deadline. Only the petitioner's current assets, those expected to be converted into cash within the coming year, may be considered.

Further, the amount of the petitioner's current assets is not available to pay the proffered wage, until it has been reduced by the amount of the petitioner's current liabilities. The petitioner's current liabilities are those that the petitioner is expected to pay within the coming year. The petitioner's current assets net of its current

liabilities are its net current assets. The petitioner's net current assets for each of the salient years will be considered below.

Counsel's reliance on the petitioner's gross income, and total wages paid is also misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537. *See* also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The proffered wage is $37,648 per year. The priority date is March 22, 1999. The W-2 forms submitted show that the petitioner paid the beneficiary $9,350, $16,256.66, $21,400, $21,250, $23,100, and $23,560 during the years from 1997 through 2002, respectively. Because the priority date was during 1999, information pertinent to 1997 and 1998 is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. The amounts paid to the beneficiary during 1999, 2000, 2001, and 2002 were less than the proffered wage.

During 1999, the petitioner declared a loss. The petitioner was unable to pay any portion of the proffered wage out of its income during 1999. The petitioner ended that year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available to it with which to pay the

proffered wage during 1999. The petitioner's 1999 tax return is insufficient, in itself or together with the 1999 W-2 form, to demonstrate the petitioner's ability to pay the proffered wage during that year.

During 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of $220,789. The petitioner was able to pay the proffered wage out of its income during 2000.

During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of $113,096. The petitioner was able to pay the proffered wage out of its income during 2001.

The petitioner submitted no reliable information pertinent to its finances during 2002. The request for evidence was issued, however, on October 9, 2002. On that date, the petitioner's 2002 income tax returns would not have been available. The appeal in this matter was received on March 6, 2003. On that date, the petitioner's 2002 tax return may still not have been available. The absence of a 2002 tax return will play no part in the instant decision.

The petitioner's 1999 tax return does not demonstrate, in itself, the ability to pay the proffered wage during 1999. The 1999 W-2 form shows that the petitioner paid the beneficiary roughly half the proffered wage during that year. That, in itself, is insufficient to show the petitioner's ability to pay the other half.

In this case, however, the petitioner enjoyed profits during 2000 and 2001 that were more than sufficient to pay the proffered wage. Although the petitioner's profits obviously fluctuate, they have generally been sufficient to pay the proffered wage. Further, although the petitioner suffered a loss during 1999, it absorbed that loss and continued doing business. The record contains no indication that the petitioner failed to disburse its payroll during that year or any other.

This office finds that the petitioner has submitted sufficient evidence to demonstrate that the loss it suffered during 1999 was uncharacteristic and is unlikely to recur. Further, the petitioner has been in business since 1989. This office is convinced that even if the petitioner suffers a loss in one or more isolated years in the future, that the business is viable and will continue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.